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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
DANIEL W. BURGESS, **PATRICIA MARIE BEILMAN,**	**CASE NO. 01-40141-13** **CHAPTER 13**
DEBTORS.	
JAN HAMILTON, Chapter 13 Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 01-7046**
ST. FRANCIS HOSPITAL AND MEDICAL CENTER,	
DEFENDANT.	

ORDER DETERMINING WHETHER SEPARATE PREFERENTIAL TRANSFERS SHOULD BE ADDED TOGETHER BEFORE APPLYING 11 U.S.C.A. §547(c)(8)

This proceeding is before the Court for resolution of a legal issue based on agreed facts. Plaintiff Jan Hamilton, the chapter 13 trustee ("the Trustee"), has appeared both *pro se* and by counsel Wendy L. Shelton. Defendant St. Francis Hospital and Medical Center ("St. Francis") appears by counsel Todd Butler. The issue is whether the Trustee can avoid two or more transfers that qualify as preferences under 11 U.S.C.A. §547(b) when each transfer was less than $600, an amount that is protected from avoidance by §547(c)(8), but the transfers add up to more than $600. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

The parties had indicated that they were going to stipulate to the facts that are involved in their dispute, but they have never submitted a signed stipulation to the Court. Instead, the Trustee has stated certain facts in his brief in support of his complaint, and St. Francis has filed a motion for summary judgment to which it attached an unexecuted "Joint Stipulation of Facts." By comparing these documents, the Court has been able to ascertain sufficient agreed facts to be able to resolve the main legal issue in dispute.

Before the debtors filed for bankruptcy, St. Francis had obtained a judgment against one of them. St. Francis garnished that debtor's wages at least three times. As a result, St. Francis received from those wages \$401.60 on November 29, 2000, \$397.42 on January 10, 2001, and \$385 on February 7, 2001. The debtors filed a chapter 13 petition on January 18, 2001. The Trustee commenced this proceeding to recover these three garnishments from St. Francis on the ground they constituted avoidable preferences under §547(b). Although the parties have not specified the applicable date, the Court's calculation indicates that the 90-day preference period established by that statute began on October 20, 2000.

St. Francis alleges that the first of the three garnishment orders that led to its recoveries was served on the debtor's employer on September 27, 2000, and that the employer then withheld \$401.60 from the debtor's wages for the period of October 1 through October 28, 2000. Based on these allegations, St. Francis claims that its garnishment lien on the \$401.60 arose when the garnishment order was served, so this transfer occurred outside the 90-day preference period. The Trustee appears to be relying on the date the wages were paid to St. Francis to establish that the transfers all occurred during the preference period. The Court cannot agree with either position.

Under Kansas law, a wage garnishment gives a creditor an interest in the debtor's wages that is essentially a lien to the extent the wages are not exempt. Under the Bankruptcy Code, "'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property," §101(54), so such a garnishment constitutes a transfer under the Code. The Court need not decide when Kansas law might consider that transfer to occur because for preference purposes, §547(e)(3) provides that, "a transfer is not made until the debtor has acquired rights in the property transferred." A person has no rights in wages before earning them. When the first garnishment order was served, the debtor had not yet earned any October wages, so St. Francis's lien could not, for preference purposes, have transferred the wages at that time. Instead, the Court is convinced that the garnishment transfer occurred only as the debtor earned the wages. Consequently, because the wages were earned from October 1 through October 28, some of the transfer occurred before the preference period began and some occurred during that period. *See Morris v. Chauhan (In re Williams)*, Case No. 99-14089-7, Adv. No. 00-5062, Memorandum Opinion and Order Granting Trustee's Complaint to Avoid and Recover Preferential Transfer (Bankr.D.Kan. Mar. 19, 2001), *slip op*. at 5-7 (reaching same conclusion about garnishment order served before preference period that attached wages earned both before and during preference period). Because the parties have presented no evidence on the point, the Court cannot now determine how much of the $401.60 obtained through the first garnishment would constitute a preference under §547(b).

St. Francis concedes that every event that might be considered to establish the dates of the transfers produced by the other two garnishments occurred during the preference period, and that these garnishments would be avoidable if they had not been transfers of less than $600 each. Because these garnishments alone add up to $782.42, the question whether they should be added together for purposes of the defense afforded by §547(c)(8) is properly before the Court for resolution. If they should be added together, the preferential portion of the first garnishment must also be added to them to determine the full amount that the Trustee may recover.

DISCUSSION AND CONCLUSIONS

As it affects this proceeding, §547(b) authorizes a bankruptcy trustee to avoid a transfer to a creditor that applies to an antecedent (that is, already-owed) debt if the transfer was made within 90 days before bankruptcy while the debtor was insolvent, and the transfer gives the creditor more than it would receive in a chapter 7 liquidation if the transfer had not been made. A leading treatise explains:

> The purpose of the preference section is twofold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during the debtor's slide into bankruptcy. The protection thus afforded the debtor often enables the debtor to work a way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section, that of equality of distribution.

5 *Collier on Bankruptcy*, ¶547.01 at 547-9 (Lawrence P. King, editor-in-chief,15th ed. rev. 2002) (footnote omitted). As indicated, St. Francis concedes that the last two garnishments both satisfy the elements of a preference as specified in §547(b), and the Court is convinced that part of the first garnishment also satisfies those elements.

St. Francis claims, however, that it is entitled to one of the defenses specified in §547(c). That defense is: "The trustee may not avoid under this section a transfer— . . . (8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600." §547(c)(8). St. Francis has the burden of proving that this defense protects the garnishments from avoidance. §547(g). The Trustee contends that all transfers to a single creditor during the preference period must be added together before applying the $600 limit, while St. Francis argues that the limit applies separately to each transfer.

St. Francis cites three cases in support of its argument, including an unpublished one from this district issued by former Judge Pearson. *See Nazar v. Ford Motor Credit Co. (In re Sanchez)*, Case No. 95-13097-7, Adv. No. 96-5045, Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Judgment on the Pleadings (Bankr. D.Kan. Aug. 23, 1996); *Wilkey v. Credit Bureau Systems, Inc. (In re Clark)*, 171 B.R. 563 (Bankr. W.D. Ky. 1994), *rev'd* 217 B.R. 89 (W.D. Ky. 1995)[1]; *Howes v. Hannibal Clinic (In re Howes)*, 165 B.R. 270 (Bankr. E.D. Mo. 1994). At least to some extent, *Nazar* and the bankruptcy court decision in *Wilkey* both expressly relied on the fact that §547(c)(8) uses the singular word "transfer." It is less clear, but *Howes* may have implicitly relied on that fact as well. This Court is convinced such reliance is misplaced, though, because §102 provides: "In this title— . . . (7) the singular includes the plural." Consequently, the "plain meaning" of the use of the singular "transfer" is not enough to demonstrate that

[1]A review of volume 217 of West's Bankruptcy Reporter indicates the district court opinion in *Wilkey* was not published until sometime in 1998, well after Judge Pearson's decision in *Nazar v. FMCC*.

Congress intended to preclude adding separate transfers together before applying §547(c)(8). The district court decision reversing the bankruptcy court decision in *Wilkey* noted that another court had pointed out that §102(7) allows "transfer" to be read as "transfers." 217 B.R. at 91. In addition, *Howes* is distinguishable from this case because one of the two transfers of less than $600 at issue there occurred outside the preference period, so any indication that the transfers could not be added together before applying §547(c)(8) was dicta.

Nazar offered some other reasons for refusing to combine separate transfers before applying §547(c)(8). The court indicated that reading "transfer" as "transfers" throughout §547(c) would virtually eliminate §547(c)(2), the defense for transfers in the ordinary course of the parties' business or financial affairs, by allowing a creditor to except a combination of multiple transfers. This Court cannot understand this concern. If a creditor tried to combine a non-ordinary-course transfer with an ordinary-course one under the provision, it seems a court would find the non-ordinary-course one took the combination out of the exception and both could be avoided, rather than finding both to be protected (the only reason the creditor would want to combine them this way). On the other hand, if multiple transfers all qualify as ordinary-course ones, the Court sees no reason why they would not all properly be protected by the (c)(2) defense. This result does not seem to eliminate the defense. The *Nazar* court also indicated that §547(c)(8) was added to the Bankruptcy Code in 1984 to stop chapter 7 trustees from recovering routine payments to utilities and credit card companies and creating minimal estates that rarely resulted in any meaningful distribution to creditors. Adding separate transfers together, the court concluded, would make the exception "meaningless," apparently meaning (c)(8) would no longer prevent trustees from creating minimal estates. However, so long as the transfers that are added together exceed the $600 threshold, the asserted goal of eliminating estates smaller than $600 would not be harmed. Furthermore, assuming "routine" payments to utilities and credit card companies means payments made on time according to the terms of the parties' contracts, the (c)(2) defense would prevent their recovery. The legislative history of §547(c)(2) as originally enacted expressly states that in consumer cases, the ordinary course of financial affairs defense would protect "such nonbusiness activities as payment of monthly utility bills." *See* H.R. Rep. No. 95-595, at 373 (1977); S. Rep. No. 95-989, at 88 (1978).

Besides the shortcomings the Court perceives in the reasoning of the rulings that have barred adding transfers together before applying §547(c)(8), the court notes that other authorities support the opposing view. A leading bankruptcy treatise declares that §547(c)(8) will not prevent the avoidance of a transfer that "is one of a series of transfers during the preference period that total at least $600." 5 *Collier on Bankruptcy*, ¶547.04[8] at 547-68 to -69 (Lawrence P. King, editor-in-chief, 15th ed. rev. 2002) (footnote omitted). A number of courts, including what appears to be the only circuit court to have addressed the question, have published decisions ruling that two or more transfers to one creditor that satisfy §547(b) must be added together before applying (c)(8). *Electric City Merchandise Co. v. Hailes (In re Hailes)*, 77 F.3d 873, 874-75 (5th Cir. 1996) (*per curiam*); *Wilkey*, 217 B.R. at 90-91; *Christians v. American Express Travel Related Servs. (In re Djerf)*, 188 B.R. 586, 588-89 (Bankr. D. Minn. 1995); *Alarcon v. Commercial Credit Corp. (In re Alarcon)*, 186 B.R. 135, 136-37 (Bankr. D.N.M. 1995); *In re Bunner*, 145 B.R. 266, 266-67 (Bankr. C.D. Ill. 1992). Judge Pearson's successor, Judge Nugent, has issued an unpublished opinion in which he agrees with these courts. *Morris v. Chauhan (In re Williams)*, Case No. 99-14089-7, Adv. No. 00-5062, Memorandum Opinion and Order Granting Trustee's Complaint to Avoid and Recover Preferential Transfer (Bankr.D.Kan. Mar. 19, 2001). In *Hailes*, the Fifth Circuit said: "[I]f we were to consider all transfers to a single creditor within the ninety-day pre-filing period individually in calculating whether the creditor has received $600, a consumer creditor could recover thousands of dollars from a pre-petition debtor under this small preference exception simply by requiring the debtor to transfer $599 in value at a time. Such an interpretation would clearly be contrary to Congress' intentions." 77 F.3d at 875. The Court agrees with this observation, and concludes that two or more separate transfers made to a single creditor that satisfy all the elements of §547(b) must be added together before applying the defense established by §547(c)(8).

The parties are directed to consult about the wages attached by St. Francis's first garnishment to see if they can agree what portion was earned before the start of the preference period and what portion was earned during it. If they cannot, they should submit a signed stipulation of the relevant facts, or else contact the Clerk's Office to schedule an evidentiary hearing on that question.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of May, 2002.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE